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No. (1)

Supreme Court, U.S.
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In The

Supreme Court of the United States

KEVIN MACK,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Petition For A Writ Of Certiorari To The First District Court Of Appeal For The State Of Florida

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I. Whether It Was Ineffective Assistance of Appellate Counsel To Fail to Argue On Appeal that Mack Was Denied His Sixth Amendment Right to Trial by Jury When His Sentence Was Increased Under a *Quarterman* Plea Agreement From the Agreed-Upon Thirty-Eight Months to Eight Years Imprisonment, Based on Judicial Fact-finding That Mack Had Committed a New Offense Pending Sentencing, An Offense Mack Denied, Instead of the Disputed Fact Being Determined By Trial By Jury.

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PETITION FOR A WRIT OF CERTIORARI

The petitioner, **KEVIN MACK**, respectfully prays that a writ of certiorari issue to review the decision of the Florida First District Court of Appeal entered March 26, 2007, rehearing denied May 4, 2007, on a habeas petition for ineffective assistance of appellate counsel. Mack then petitioned the Florida Supreme Court for discretionary review of the decision of the Florida First District Court of Appeal, and his petition was denied November 19, 2007.

OPINION AND DECISION BELOW

The decision of the Florida First District Court of Appeal was reported as *Kevin Mack v. State of Florida*, 955 So.2d 51 (Fla. 1st DCA 2007), and a copy of that decision is included in the Appendix, *infra*. Review was denied by the Florida Supreme Court in an unreported decision found at *Kevin Mack v. State of Florida*, 970 So.2d 824 (Fla. 2007), a copy of which is also included in the Appendix, *infra*.

JURISDICTION

Petitioner Kevin Mack filed a habeas petition alleging ineffective assistance of appellate counsel relating to the failure to present on direct appeal a preserved *Blakely* error (*Blakely v. Washington*, 542 U.S. 296 (2004)). The Florida First District Court of Appeal denied relief in a published decision. Mack

then sought discretionary review at the Florida Supreme Court, which denied his petition for review on November 19, 2007. This petition followed in a timely manner within ninety days of that decision. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF FACTS MATERIAL TO THE ISSUES PRESENTED

The original appeal in this case, as to which Mack is asserting he had ineffective assistance of appellate counsel, arose out of a judgment and sentence for one count of possession of a firearm by a convicted felon. The trial proceedings were held in the

Circuit Court for Duval County, Judge Lawrence Haddock, circuit court judge, presiding.

By information filed September 11, 2003, Kevin Mack was charged with one count of possession of a firearm by a convicted felon, in contravention of section 790.23, Florida Statutes. (R.I, 7).[1] Mack subsequently entered a plea of guilty. (R.I, 28). The plea agreement called for a sentence of thirty-eight months in prison with a minimum mandatory term of three years.[2] (R.I, 28).

The plea agreement also provided, however, that sentencing would be deferred, and that if Mack failed to appear for sentencing or committed "a new crime supported by probable cause," Mack could be sentenced to any lawful term. (R.I, 28). There was no provision in the plea agreement as to the mechanism for making the determination that a new crime had been committed if there were a later allegation of a new crime by Mack.

At sentencing, the state argued that Mack had committed a new offense: battery against his twenty-year-old daughter, Kellisha Priester. (R.I, 192, 194). The defense denied the allegation. At what amounted

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[1] Record citations are to the record on appeal of the original direct appeal or to the applicable transcript of sentencing.

[2] The plea actually provided that appellant would be sentenced as an habitual felony offender. (R.I, 28). The state, however, subsequently abandoned its request for the enhanced sentence and withdrew the habitual offender notice. (R.II, 216).

to a probable cause hearing, the state and defense presented witnesses, following which the judge alone, without a jury, made a finding that Mack had committed the alleged new offense while awaiting sentencing.

Defense counsel objected that there was no probable cause to determine that Mack had committed a new crime. [July 30, 2004 sentencing hearing, p. 26] At the conclusion of the evidentiary hearing defense counsel made a form of *Blakely* objection, stating:

> [I]f the Court finds that the plea agreement has been violated in any way, I think at that time I would be filing a *Blakely* motion that I have been filing in all the other cases because I think the State would then try to proceed with a sentencing up to the HO maximum. And so, then I would ask the Court to – that we have the *Blakely* hearing which we have already set for the 13th, I informed Mr. O'Keefe about it.
>
> . . .
>
> It was contemplated HFO but the difference being under *Blakely* if you – if you agree to a sentence – if you agree that you meet the qualifications that's like entering a plea to anything, so you're then admitting that. And so I think if everything was to go – if the Court said, all right, I'm still finding the agreement as is, then we would be – we would then be stipulating to the fact he does qualify as an habitual felony offender. If not,

> then the sentence is all gone and then our position is that the Court – *that's something that has to be made determination by the jury.*

[July 30, 2004 sentencing hearing, pp. 27-28]

The sentencing was postponed to August 13, 2004. At that time having made a judicial fact finding that Mack had committed a new offense while awaiting sentencing, the trial court determined that it was no longer bound by the thirty-eight-month agreed-upon sentence in the plea agreement. Thereupon the trial court sentenced Mack to a term of eight years in prison with credit for time served. (R.II, 232). The trial court also imposed a minimum mandatory term of three years. (R.II, 232).

Before imposition of sentence defense counsel objected:

> Judge, first I would like to point out that it's still our opinion that Mr. Mack did not violate the agreement between himself, the state and the court, that – and we believe he should be sentenced based upon his plea agreement that he entered before the court.
>
> Judge, it's always – I think it's always dangerous to start sentencing people and taking in light stuff that hasn't been proven before a jury, such as this allegation that was made against Mr. Mack.
>
> . . .
>
> And if we now go back and start looking at things that happened after that [after the

> plea agreement] *that haven't been proven to a jury,* then we start getting into circumstances where people may get wrongfully punished for things that they didn't do.

[Sentencing hearing, August 13, 2004, p. 9; p. 11]

A timely notice of appeal was filed and the public defender was appointed for purposes of appeal. In a letter from Ward L. Metzger, Esq., assistant public defender in Jacksonville to Douglas Brinkmeyer, assistant public defender in Tallahassee, dated October 6, 2004, attorney Metzger expressly noted in all capital bold type letters that the issue was that "**THE COURT ERRED IN VIOLATING THE PLEA AGREEMENT**." This was also the only issue listed in the statement of judicial acts to be reviewed which was filed with the court.

However the appellate public defender instead addressed two unrelated issues in the initial appeal brief:

> Issue I – Whether Appellant's Spontaneous Statement to Officer McKinley Constituted Fruit of an Illegal Arrest Erroneously Admitted by the Trial Court?
>
> and
>
> Issue II – Whether Appellant's Statement to Officer Bible Constituted the Fruit of an Illegal Arrest Erroneously Admitted by the Trial Court.

The Florida First District Court of Appeal affirmed the conviction and sentence *per curiam* without published opinion August 11, 2005, *Mack v. State of Florida*, 908 So.2d 1061 (Fla. 1st DCA 2005) (table of unreported cases).

Mack then filed a timely habeas petition with the Florida First District Court of Appeal alleging ineffective assistance of appellate counsel based on his appellate public defender's failure to argue the preserved *Blakely* issue on direct appeal. The Florida First District Court of Appeal denied relief in a published opinion, *Mack v. State of Florida*, 955 So.2d 51 (Fla. 1st DCA 2007) and denied rehearing and rehearing *en banc* May 4, 2007. Mack then sought discretionary review at the Florida Supreme Court, which was denied on November 19, 2007, and reported at *Mack v. State*, 970 So.2d 824 (Fla. 2007) (table of unreported cases).

Defendant-Petitioner Mack requests this honorable Court grant his petition for certiorari to the Florida First District Court of Appeal based on his claim of ineffective assistance of appellate counsel, because the Florida First District Court of Appeal erred under *Blakely v. Washington*, 542 U.S. 296 (2004), in using judicial fact-finding to determine a factor which increased Mack's sentence from the agreed-upon thirty-eight months to eight years.

ARGUMENT

I. Whether It Was Ineffective Assistance of Appellate Counsel To Fail to Argue On Appeal that Mack Was Denied His Sixth Amendment Right to Trial by Jury When His Sentence Was Increased Under a *Quarterman* Plea Agreement From the Agreed-Upon Thirty-Eight Months to Eight Years Imprisonment, Based on Judicial Fact-finding That Mack Had Committed a New Offense Pending Sentencing, An Offense Mack Denied, Instead of the Disputed Fact Being Determined By Trial By Jury.

Kevin Mack entered into a *Quarterman*[3] plea agreement under which he pled guilty subject to an agreed upon sentence of thirty-eight months imprisonment. A *Quarterman* plea agreement is the term applied in Florida to a form of plea agreement whereunder a Defendant pleads guilty but is allowed to remain free on bond (or is then released on bond as a reward as it were after pleading guilty), and given a later date to report back for sentencing.[4] The Defendant

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[3] *Quarterman v. State*, 527 So.2d 1380 (Fla. 1988).

[4] Most defendants in Florida state courts are sentenced in the same proceeding at which they plead guilty. Only in a minority of cases will a Florida Court agree to delay sentencing after a guilty plea. Typically this is to allow the Defendant to make arrangements concerning his personal affairs before reporting to jail or prison, but in some cases it is to permit substantial assistance for a sentence reduction, but this is not as common in Florida courts as it is in federal courts today.

is advised by the Court that if in the interim he commits a new crime, the sentencing provision contained in his plea agreement (agreed upon sentence or sentencing cap, in this case, thirty-eight months) is forfeited, he will not be allowed to withdraw from his plea agreement, will be bound by his guilty plea, and then may be sentenced to any sentence at the judge's discretion up to the statutory maximum for the offense to which he has pled guilty. This is typically done orally at the change of plea. As in this case, nothing is said about what procedure will be used to determine whether a new offense has been committed if there is an allegation of a new offense and the Defendant denies having committed the new offense.

While free on bond pending sentencing Mack was charged with committing a new offense, battery on his adult daughter. Mack denied the new charge.

Over Mack's express *Blakely*[5] objection, the sentencing judge in the original case, acting alone without a jury, made a judicial fact-finding that Mack had committed the new offense. Mack argued that the determination of this fact must be made by trial by jury citing *Blakely v. Washington*. The judge overruled Mack's *Blakely* objection. Instead, relying solely on his own judicial fact finding, the sentencing judge determined that Mack had committed a new offense and based on the commission of the new offense, the Court was no longer bound by the thirty-eight month

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[5] *Blakely v. Washington*, 542 U.S. 296 (2004).

agreed-term of the plea agreement, but instead could impose any sentence up to the offense statutory maximum, and thereupon imposed a sentence of eight years imprisonment.

Mack appealed. His court-appointed appellate counsel failed to argue the *Blakely* issue, instead arguing two unrelated points which were found to have no merit and were denied *per curiam* without written opinion.

Mack then filed a timely habeas corpus petition alleging ineffective assistance of appellate counsel – that his appellate counsel should have argued that under *Blakely* the judge was prohibited from determining any factor that would increase the sentence which otherwise could have been imposed. Absent the finding that Mack had committed a new offense, the maximum sentence that Mack was subject to was thirty-eight months. Thus under *Blakely* the "statutory maximum" as that term is defined in *Blakely* and the Supreme Court's subsequent jurisprudence, was the thirty-eight month sentence authorized by the plea agreement based on the facts stipulated to in the plea agreement, that is, the underlying offense only.

When the state alleged that Mack had committed a *new* offense while awaiting sentencing, the sentencing judge could not engage in judicial fact-finding to determine whether Mack had committed the new offense or not, and then use that judicially found fact to increase Mack's sentence beyond thirty-eight

months as agreed to in the plea agreement. To do so directly contravenes the rule in *Blakely*.

The Florida District Court of Appeal decision quoted the pertinent language from the *Blakely* holding:

> In other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum [a judge] may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts which the law makes essential to the punishment, and the judge exceeds his proper authority.

But the State Court then proceeded to misapply *Blakely*'s holding: the state court concluded that the maximum statutory penalty for Mack's second degree felony offense was fifteen years and the trial judge did not go beyond this statutory maximum when it imposed the eight year sentence. This decision squarely misapplies *Blakely*. The Florida Court's interpretation of "statutory maximum" is that which pertained *pre-Blakely*.

After *Apprendi*[6] but before *Blakely* courts had interpreted the limitation on judicial fact-finding to be circumscribed by the *offense statutory maximum* (that is, to statutory sentencing enhancements, most

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[6] *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

notably in federal drug offenses where unpled drug quantities could trigger increases in statutory maximums). But this understanding of the limitation was wiped away in *Blakely*, which made clear that any *factor* which increases the *otherwise applicable sentence,* even if the sentence so determined remained within the putative statutory maximum, must either be stipulated to in a plea agreement, if there is one, or found by a jury after proof beyond a reasonable doubt.

The sentence at issue in *Blakely* was a sentence within the *statutory* maximum, yet the Court struck it (and the entire Washington state sentencing scheme) as unconstitutional, because it allowed a judge to determine sentencing factors which in turn increased the *sentencing guideline range* – even though that range remained capped below the statutory maximum. This point was driven home again in *Booker*,[7] and once again, more forcefully in *Cunningham*.[8] This Court has not retreated from this interpretation of "statutory maximum" first given in *Blakely*, rather it has continued to push the principle ever further.

In Mack's case, the sentencing judge increased Mack's agreed-upon thirty-eight month sentence solely based upon the sentencing judge determining a

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[7] *Booker v. United States*, 543 U.S. 220 (2005).

[8] *Cunningham v. California*, 127 S.Ct. 856 (2007).

disputed sentencing factor – whether Mack had committed a new offense awaiting sentencing. Disputed sentencing factors that serve to increase a sentence may not be determined by a judge alone – that is the holding of *Blakely, Booker* and *Cunningham*.

The context is new but the application remains the same: the Florida decision simply misapplies *Blakely*. The question is of exceptional importance, as signified by the panel's written decision, and by the frequent use and abuse of *Quarterman* plea agreements in the Florida courts. Mack agrees that the Florida courts may continue to use the *Quarterman* plea agreement, but their use must be in compliance with the Sixth Amendment.[9]

If this Court were not inclined to grant plenary review, then alternatively Mack requests that this Court exercise its discretionary certiorari jurisdiction, grant certiorari, vacate the judgment below, and remand the case ("GVR") so that the Florida First

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[9] To bring the *Quarterman* plea agreement into compliance with the Sixth Amendment requires only that either (1) new offenses must first be either admitted by the defendant or proven at trial by jury, or (2) that the plea agreement itself authorize the court to make the determination whether a triggering event or offense has occurred or not. There is nothing in *Blakely* that prohibits a defendant from waiving his right to trial by jury as to any sentencing factor. The plea agreement in Mack's case was silent on this point. Constitutional rights may not be waived by silent implication.

District Court of Appeal can correct the obvious error affecting Mack's substantial rights. Title 28 U.S.C. § 2106 confers upon this Court a broad power to GVR, the power to remand to a lower court any case raising a federal issue that is properly before it in its appellate capacity. *Lawrence v. Chater*, 516 U.S. 163, 166 (1996). "The GVR order has, over the past 50 years, become an integral part of this Court's practice, accepted and employed by all sitting and recent Justices." *Id.* "[T]he GVR order can improve the fairness and accuracy of judicial outcomes while at the same time serving as a cautious and deferential alternative to summary reversal in cases whose precedential significance does not merit [this Court's] plenary review." *Id.* at 168, 116 S.Ct. at 606; *see also Stutson v. United States,* 516 U.S. 193 (1996) (applying *Lawrence* to a criminal case).

Mack suggests that the issue is of sufficient significance to merit plenary review, because of the recurring nature of the problem in the Florida courts (and the same problem likely presents itself in other jurisdictions as well), but barring that, this substantial injustice should be corrected by a GVR.

CONCLUSION

Based on the foregoing, Petitioner Kevin Mack respectfully requests this Honorable Court grant his petition for a writ of certiorari to the First District Court of Appeal for the State of Florida.

Respectfully submitted,

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APPENDIX

955 So.2d 51

District Court of Appeal of Florida, First District.

Kevin MACK, Petitioner,

v.

STATE of Florida, Respondent.

No. 1D06-4096.

March 26, 2007.

Rehearing Denied May 4, 2007.

William Mallory Kent of the Law Office of William Mallory Kent, Jacksonville, for Petitioner.

Bill McCollum, Attorney General, and Alan R. Dakan, Assistant Attorney General, Tallahassee, for Respondent.

BENTON, J.

In a petition for writ of habeas corpus (styled petition for habeas corpus relief) Kevin Mack contends that counsel on his direct appeal was ineffective for failing to argue that *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and *Blakely v. Washington,* 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), required reversal of his sentence. We do not agree that *Apprendi* and *Blakely* have any application in his case and deny the petition.

As a federal constitutional matter, a criminal defendant is entitled to the assistance of counsel on the first appeal of right from a conviction, even if unable to afford private counsel. *See Ross v. Moffitt,* 417 U.S. 600, 606-15, 94 S.Ct. 2437, 41 L.Ed.2d 341

(1974); *Douglas v. California,* 372 U.S. 353, 354-58, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963). "Habeas petitions are the proper vehicle to advance claims of ineffective assistance of appellate counsel." *Rutherford v. Moore,* 774 So.2d 637, 643 (Fla.2000). *See* Fla. R.App. P. 9.141(c)(2) (2006) ("Petitions . . . alleging ineffective assistance of appellate counsel shall be filed in the appellate court to which the appeal was or should have been taken.").

"When analyzing the merits of the claim, '[t]he criteria for proving ineffective assistance of appellate counsel parallel the *Strickland [v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984),] standard for ineffective trial counsel.'" *Rutherford,* 774 So.2d at 643 (first alteration in original) (footnote omitted) (quoting *Wilson v. Wainwright,* 474 So.2d 1162, 1163 (Fla.1985)). The petitioner must show

> first, that appellate counsel's performance was *deficient* because "the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance" and second, that the petitioner was *prejudiced* because appellate counsel's deficiency "compromised the appellate process to such a degree as to undermine confidence in the correctness of the result." *Thompson* [*v. State,* 759 So.2d 650, 660 (Fla.2000)]. If a legal issue "would in all probability have been found to be without merit" had counsel raised the issue on direct appeal, the failure of appellate counsel

> to raise the meritless issue will not render appellate counsel's performance ineffective. *Williamson v. Dugger,* 651 So.2d 84, 86 (Fla.1994).

Rutherford, 774 So.2d at 643 (citations omitted). *See also Downs v. Moore,* 801 So.2d 906, 910 (Fla.2001) (stating "appellate counsel cannot be deemed ineffective for failing to raise non-meritorious claims"). To prevail on a claim of ineffective assistance of counsel, trial or appellate, the defendant must establish "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland,* 466 U.S. at 687, 104 S.Ct. 2052.

On March 4, 2004, Mr. Mack entered a plea of guilty to possession of a firearm by a convicted felon, a second degree felony. He had signed a plea agreement, styled Plea of Guilty and Negotiated Sentence, under which his sentence was to have been thirty-eight months in state prison, with a three-year minimum mandatory term, subject, however, to this proviso: "Sentence will be deferred until April 20, 2004. . . . If defendant fails to appear or commits a new crime supported by probable cause. Plea will stand but Defendant can receive any legal sentence." Petitioner does not seek to set aside the plea agreement and does not question its validity.

Our supreme court has held that plea agreements may contain conditions that depend on later fact finding. *See Quarterman v. State,* 527 So.2d 1380,

1382 (Fla.1988) (noting "the conditions which Quarterman agreed to were not imposed after the plea bargain had been accepted, but were accepted as 'an integral part of the bargain itself' ") (citations omitted).

> *Quarterman* . . . teaches that there is nothing inherently wrong with making the agreed-upon sentence contingent upon the defendant's not committing another offense while at liberty and appearing at sentencing as ordered.

Bennett v. State, 858 So.2d 1251, 1252 (Fla. 5th DCA 2003). *See id.* at 1252-53 (indicating that, where a court-approved plea agreement contains conditions that subsequent events trigger,[1] the defendant "and the court [can be viewed as having] entered a valid modification of the plea agreement . . . authoriz[ing

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[1] If petitioner's view were correct, all conditions in *Quarterman* plea agreements could lead to jury trials on whether the condition in the plea agreement was violated, including even whether the defendant failed to appear at the sentencing hearing. *See generally Quarterman v. State,* 527 So.2d 1380, 1381 (Fla.1988). Plea bargains are designed to avoid, not to foment jury trials. *See Santobello v. New York,* 404 U.S. 257, 260, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971) (noting that, if all criminal cases were tried, "the States and the Federal Government would need to multiply by many times the number of judges and court facilities"). If a trial must take place, moreover, some might argue that it would be preferable to try the offense charged, instead of a tangential question which does not affect the statutorily prescribed maximum sentence to which a defendant is subject.

the court] to impose the sentence it did," even though more severe than the sentence the plea agreement originally called for).

While free on bond, after his plea had been accepted but before he was sentenced, Mr. Mack was arrested on charges of battery. After an evidentiary hearing at which both sides presented evidence, the trial court found probable cause to believe he had committed the battery, so violating the plea bargain condition. On that account, the trial court concluded it was no longer bound to impose the thirty-eight-month sentence originally negotiated, and subsequently sentenced him to eight years' imprisonment.

Petitioner's judgment and sentence were affirmed on direct appeal, on August 11, 2005. *Mack v. State,* 908 So.2d 1061, 1061 (Fla. 1st DCA 2005). He filed the present petition for writ of habeas corpus on August 9, 2006, claiming that counsel on the direct appeal was ineffective. *See* Fla. R.App. P. 9.141(c)(4)(B) (2006) ("A petition alleging ineffective assistance of appellate counsel shall not be filed more than 2 years after the conviction becomes final on direct review unless it alleges under oath with a specific factual basis that the petitioner was affirmatively misled about the results of the appeal by counsel.").

Petitioner argues that *Blakely* and *Apprendi* require relief because the trial judge, not a jury, engaged in factfinding which became the basis for imposing an eight-year sentence, instead of the thirty-eight-month sentence he agreed to in the plea

bargain. At issue is whether *Blakely* and *Apprendi* lay down a federal constitutional imperative, not whether empanelling a new jury for sentencing in a non-capital case is currently authorized under state law. *See generally Galindez v. State,* 955 So.2d 517, 527, 2007 WL 471164 (Fla. Feb. 15, 2007) (Cantero, J., concurring) ("To remedy violations of *Apprendi* and *Blakely,* we would be entirely justified in adopting a procedure for the empanelling of new juries on resentencing.").

Preliminarily, the State contends that the issue was not preserved by appropriate objection in the trial court, and that appellate counsel cannot, for that reason, be faulted for failing to raise the issue. *See Davis v. State,* 928 So.2d 1089, 1127 (Fla.2005) ("Generally, appellate counsel cannot be ineffective for failing to present claims which were not preserved due to trial counsel's failure to object."). The State's preservation argument lacks force here.

Even if not raised adequately by trial counsel, an *Apprendi* claim could have been presented in a motion pursuant to Florida Rule of Criminal Procedure 3.800(b) at any time "before the party's first brief is served." Fla. R.Crim. P. 3.800(b)(2) (2004). *See, e.g., Gisi v. State,* 848 So.2d 1278, 1282 (Fla. 2d DCA 2003) ("Although the *Apprendi* issue was not raised at sentencing by trial counsel, appellate counsel could have preserved the issue for appellate review by filing a motion to correct a sentencing error in the trial court pursuant to Florida Rule of Criminal Procedure 3.800(b)(2)."); *Arrowood v. State,* 843

So.2d 940, 941-42 (Fla. 1st DCA 2003) (reversing because appellant was entitled to relief under *Apprendi* when the claim was raised during the pendency of the appeal in a Rule 3.800(b)(2) motion). Since appellate counsel could have preserved the issue, it is no defense to petitioner's claim of ineffective assistance that appellate counsel (like trial counsel) failed to do so.

The Court explained in *Blakely* "that the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" *Blakely,* 542 U.S. at 303, 124 S.Ct. 2531.

> In other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum [a judge] may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts which the law makes essential to the punishment, and the judge exceeds his proper authority.

Id. at 303-04, 124 S.Ct. 2531 (quotation marks and citation omitted). The maximum penalty prescribed by statute for the second degree felony petitioner committed and pleaded guilty to is fifteen years.[2] The

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[2] In the plea agreement, the petitioner agreed to be sentenced as an habitual offender. At sentencing, however, the

(Continued on following page)

trial court did not go beyond this "prescribed statutory maximum" when it imposed an eight-year sentence. *Apprendi,* 530 U.S. at 490, 120 S.Ct. 2348.

Petitioner was sentenced after the United States Supreme Court had decided both *Apprendi* and *Blakely. Cf. Hughes v. State,* 901 So.2d 837, 838 (Fla.2005) ("[W]e hold that *Apprendi* does not apply retroactively.") (emphasis omitted). But petitioner's argument founders because a sentence violates due process under *Apprendi* and *Blakely* only when it exceeds the "prescribed statutory maximum." *Apprendi,* 530 U.S. at 490, 120 S.Ct. 2348 ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.").

Apprendi and *Blakely* deal with the prerogatives of judges vis-a-vis juries, and stake out ground onto which the judge cannot intrude, without impermissibly adulterating the right to trial by jury. But it has never been held that parties can impose a cap on the length of a sentence that the sentencing judge is not free to reject in the sound exercise of judicial discretion. In *Rollman v. State,* 887 So.2d 1233, 1235 (Fla.2004), our supreme court held that a trial judge may "alter" a plea agreement at any time before sentence is imposed.

State withdrew the notice of intent to classify the petitioner as an habitual offender.

> We continue to agree that a trial court retains the authority to alter a prior plea arrangement up until the time sentence is imposed, so long as the trial court provides the defendant an opportunity to withdraw any plea that was entered in reliance on the promised sentence. It does not matter whether the judge simply changed his mind, or whether there was a misunderstanding.

Id. The *Rollman* court also approved this court's ruling that "the defendant was not entitled to specific performance of the [plea] agreement, but was limited to withdrawing his plea."[3] *Id. See also Santobello,* 404 U.S. at 262-63, 92 S.Ct. 495 (leaving to state courts whether, when a plea agreement is breached, to require "specific performance of the agreement on the plea . . . or . . . the opportunity to withdraw [the] plea"). In any event, a sentence to which the parties agree in a plea bargain is not a "prescribed statutory maximum."

In sum, petitioner argues that once the trial court accepted a plea predicated on the plea agreement, it was bound not to exceed the sentence agreed upon, without a trial by jury. But this ignores the thrust of the plea agreement taken as a whole, and finds no support in any of its individual provisions. While the State is unquestionably bound by any plea agreement that induces a plea of guilty or nolo contendere, *see*

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[3] The petitioner does not (and did not below) seek to withdraw his plea. He is seeking specific performance.

generally Santobello, 404 U.S. at 262, 92 S.Ct. 495 (holding that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled"), so is the defense. *Quarterman,* 527 So.2d at 1382. The requirements of *Apprendi* and *Blakely* do not come into play because the "prescribed statutory maximum" is not at issue.

The petition for writ of habeas corpus (styled petition for habeas corpus relief) is denied.

BARFIELD and POLSTON, JJ., concur.

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970 So.2d 824

Supreme Court of Florida.
Kevin MACK, Petitioner(s)
v.
STATE of Florida, Respondent(s).
No. SC07-1036.

Nov. 19, 2007.

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution, and the Court having determined that it should decline to accept jurisdiction, it is ordered that the petition for review is denied.

No motion for rehearing will be entertained by the Court. *See* Fla. R.App. P. 9.330(d).

LEWIS, C.J., and WELLS, ANSTEAD, CANTERO, and BELL, JJ., concur.